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Supreme Court, U.S.
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No. 95-104

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NATIONAL REFRACTORIES & MINERALS CORPORATION,

Petitioner,

v.

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 890,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the court below act properly by applying well-settled legal principles favoring the arbitration of labor disputes and compelling arbitration of a union's grievance challenging an employer's alleged diversion of bargaining unit work, where the relevant collective bargaining agreement contains a broad arbitration clause covering all disputes arising thereunder and where there was no forceful evidence of an intent to exclude the dispute from arbitration?

Is the established presumption favoring the arbitration of labor disputes converted into a presumption against arbitration whenever the employer characterizes the dispute sought to be arbitrated as one involving a nonmandatory subject of bargaining?

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STATEMENT OF THE FACTS

National Refractories mines and processes minerals and produces ingredients used in turn to create bricks capable of withstanding tremendous temperatures. It both sells these ingredients to industrial customers and also uses them in its own brick manufacturing plants. The Union represents the Company's employees who mine raw materials for, process and handle the Company's products. (App. A-2.)

The Company and the Union are parties to a written collective bargaining agreement containing a mandatory grievance and arbitration provision for the resolution, by its terms, of "any disagreement or dispute between the parties." The final step in the dispute resolution procedures is arbitration by a neutral arbitrator, whose decision is final and binding upon the parties. (App. D-8 through D-13.)

The collective bargaining agreement also contains, *inter alia*, a provision (Article IX) requiring that "maintenance and production work shall continue to be performed by Bargaining Unit Employees," and imposing strict limitations upon the conditions under which the Employer may use anyone other than bargaining unit employees to perform bargaining unit work. (App. D-7, D-8.) Another provision of the agreement (Article XXV) seeks to preserve the work of the bargaining unit by specifying "that the Employer shall not permit anyone exempted from membership in the Bargaining Unit to do work customarily performed by a member of the bargaining unit, except in an emergency or for training purposes." (App. D-14.) Finally, Article IV - "Management Responsibilities" - provides, *inter alia*, that "[t]he Employer shall not be hindered or prevented from using any type or quantity of machinery, materials, or appliances; nor shall the Union attempt to regulate production at any of the plants or quarry." (App. D-6, D-7.)

Prior to the events giving rise to the Union's grievance, one of the ingredients the Company manufactured was a synthetic magnesia known as KF-95, produced by mining raw dolomite, mixing it with sea water, and superheating it. The mining and processing of

the dolomite and manufacture and handling of the resultant KF-95 represented a significant portion of the bargaining unit work performed by employees represented by the Union. (Cert. Pet. p. 3; App. A-2, B-2.)

During 1992, a dispute arose between the parties to the agreement concerning the Company's substitution of natural magnesite purchased from (and mined and processed in) the People's Republic of China, in place of the KF-95 produced by bargaining unit members, which substitution resulted in the layoffs of several employees. The Union filed a grievance claiming that the Company's development and continuation of this practice constituted a diversion or substitution of work assigned to the bargaining unit to individuals not covered by the agreement (*i.e.*, those in China), in violation of the work preservation provisions of Articles IX and XXV. The Company denied that it was in violation of the parties' collective bargaining agreement, claiming that the purchase of such materials from China was a business decision it was privileged to make under Article IV, the management responsibilities clause of the agreement. (App. A-2, A-3, B-2.) The merits of the dispute between the parties thus called for an interpretation and determination of the interplay between the management prerogative language in Article IV on one hand, and the work guarantees given to bargaining unit employees in Articles IX and XXV on the other.

The Union demanded arbitration of the dispute, and the Company refused to submit the dispute to arbitration. The Union then filed suit in the United States District Court for the Northern District of California to compel arbitration. (App. A-2, B-2.)

DECISIONS OF THE COURTS BELOW

The district court found that a strong presumption of arbitrability arose from the broad and general language of the arbitration clause, that the Company had failed to come forward with forceful evidence of an intent to exclude the dispute from arbitration, and accordingly it granted the Union's petition to compel arbitration. (App. A-1 through A-9.) The Company appealed the district

court's decision to the Ninth Circuit, which affirmed. (App. B.) Succinctly stated, the basis for the Ninth Circuit's decision was its determination that (App. B-4):

> Whether the decision violates Article IX or Article XXV of the [collective bargaining agreement ("CBA")], as the Union contends, or is an exclusive management decision under Article IV of the CBA, as the Company contends, requires an interpretation of the CBA . . . and thus is subject to the arbitration clause of Article XXI.

The Ninth Circuit found the Company's reliance on *First National Maintenance Corp. v. NLRB*, 452 U.S. 66 (1981), to be "misplaced" on the following grounds (App. B-4, B-5):

> [*First National*] involved a question of whether a plant closure decision was a mandatory subject of bargaining. The question here is whether a dispute under an existing collective-bargaining agreement is subject to arbitration. Management may not have a statutory duty to bargain about a subject, and yet may have entered into a collective-bargaining agreement that relates to that subject and requires mandatory arbitration to interpret the contractual provisions. The *First National* decision is therefore not relevant to this case.

Circuit Judge Kleinfeld dissented. (App. B-5 through B-9.) The dissenting judge interpreted Article IV of the agreement to constitute an implied limitation upon the otherwise unqualified work preservation provisions relied upon by the Union. Relying on the language of Article IV, and not the grievance and arbitration provisions, the dissent concluded that "the contract expressly carves out a list of management prerogatives which are not to be infringed [upon] by collective bargaining or arbitration." (App. B-7).

The Ninth Circuit denied the Company's petition for rehearing and suggestion for rehearing *en banc*, and the petition for certiorari followed thereafter.

REASONS FOR DENYING THE PETITION

A. This Case Presents No Novel Questions Warranting This Court's Review

The disposition below represents the application of settled law to an unexceptional factual pattern that presents no novel questions warranting this Court's review. Both the district court and the Ninth Circuit have followed an unswerving line of decisions spanning nearly forty years, in which this Court has laid out the principles to be applied by a court presented with a petition to compel arbitration of a grievance under a collective bargaining agreement.

In 1957 the Court determined that Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a), authorized the issuance of an order compelling an employer to arbitrate a grievance where the relevant collective bargaining agreement contains a mandatory grievance and arbitration procedure for the resolution of disputes between the parties. *Textile Workers v. Lincoln Mills*, 353 U.S. 447, 450-51 (1957). Three years later the Court recognized the existence of a federal labor law policy strongly favoring resolution of labor disputes through arbitration. As summarized in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960):

> An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

In subsequent years this principle has been repeatedly recognized and reaffirmed by the Court. See, *Wiley & Sons v. Livingston*, 370 U.S. 543 (1964); *Operating Engineers v. Flair Builders*, 406 U.S. 487 (1972); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974); *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977).

The presumption in favor of arbitrability carries particular force when the arbitration clause is written in broad and general terms calling for the submission to arbitration of "all disputes arising under the agreement." *A.T.& T. Technologies v. Communications Workers*, 475 U.S. 643, 650 (1986). When a literal reading of the collective bargaining agreement reflects that the parties have committed all disputes to arbitration, only an "express provision excluding a particular grievance from arbitration, . . . [or] the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *A.T.& T., supra*, 475 U.S. at 650, quoting *Warrior & Gulf, supra*, 363 U.S. at 584-585.

Finally, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *A.T.& T., supra*, 475 U.S. at 649. "Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the courts asked to order arbitration, but as the parties have agreed, by the arbitrator." *A.T. & T., supra*, 475 U.S. at 649-50. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

The courts below applied the foregoing well-settled principles in compelling arbitration in this case. As we have said, the dispute between the parties is whether Article IV of the agreement vali-

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[1] There is simply no room within this analytical framework for the reasoning of the dissent in the court below, which bases its conclusion against arbitration on an interpretation of the contract language addressed to the merits of the dispute. See *A.T.& T., supra*, 475 U.S. at 651; see also Justice Brennan's concurrence at pp. 654-655.

dates the Company's decision to cease certain operations historically performed by bargaining unit employees, and arrange to have that work done elsewhere, notwithstanding the work preservation language in Articles IX and XXV. This is certainly a dispute that fits comfortably within the provisions of the agreement referring *all* disputes of contract interpretation for resolution through its grievance and arbitration procedures. Thus, the strong presumption favoring arbitration adheres and can be overcome only by the "most forceful" evidence of a purpose to exclude this dispute from arbitration. *A.T.& T., supra*, 475 U.S. at 650. Further, as both courts below found, nothing in the record herein comes close to "forceful evidence" of an intent to exclude the Union's grievance from arbitration. At best, the Company asked the courts below to "imply" an exclusion by interpreting contractual language and bargaining history in a manner that preempts the arbitrator's function. This the courts below quite properly declined to do.[2]

B. The Presumption Favoring Arbitrability of Labor Disputes is Not Affected by Characterizing a Dispute as Involving a Non-Mandatory Subject of Bargaining

Contrary to the Company's assertion, it is the analysis urged by it, not that employed by the courts below, that would stand well-settled principles on their head. The Company in effect

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[2] Indeed, this case is on all fours with this Court's decision in *Warrior & Gulf, supra*. There, an employer refused to arbitrate a grievance over its decision to contract out a substantial portion of the bargaining unit's work, asserting that its actions were privileged under a contractual management rights clause providing that "matters which are strictly a function of management shall not be subject to arbitration . . . ." In reversing the lower courts' denial of an order compelling arbitration, this Court noted that "[c]ontracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." *Id.*, at 584. Finding no express exclusion or forceful evidence of intent to exclude, the Court held that arbitration should have been compelled. *Id.*

argues that, whenever a grievance can be characterized as one involving a non-mandatory subject of bargaining, the presumption favoring arbitration is converted into a presumption against arbitrability, requiring a "clear and unmistakable waiver" before arbitration may be compelled. The Company's novel contention is utterly at odds with the long line of authority discussed above.

The Company cites this Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), in support of its eccentric theory. In *First National*, this Court held that an economically-motivated partial closure decision is not ordinarily a mandatory subject of bargaining under the National Labor Relations Act, 29 U.S.C. Section 151, *et seq.* But, as recognized by the courts below as well as those of other circuits, *First National Maintenance* simply has no relevance where, as here, the Union neither filed unfair labor practice charges with the NLRB nor sought to bargain with the Company over its decision to eliminate bargaining unit work. The Union does not assert that the Company's actions violate the NLRA but rather that the Company has violated provisions of the existing collective bargaining agreement. As stated above, this contention must be resolved under the grievance and arbitration provisions of the collective bargaining agreement, not the provisions of the NLRA.

Plant closure decisions are *not* illegal subjects of bargaining; rather, they are so-called "permissive" subjects of bargaining, and management and labor are free to bargain and to incorporate provisions regarding them into enforceable collective bargaining agreements. *First National Maintenance, supra*, 452 U.S. at 675, n. 13. Thus, in any given case management may be under no obligation under the NLRA to bargain about a certain decision, but yet may have a contractual obligation not to take that same action based upon either the express or implied provisions of the collective bargaining agreement. That is precisely the situation here. Nothing in the law suggests that an employer is free to ignore a contractual obligation it has assumed with respect to a non-mandatory subject of bargaining. The distinction the Company's position overlooks is well-illustrated in *Teamsters Local 115 v.*

DeSoto, Inc., 725 F.2d 931 (3rd Cir. 1984). There, a union challenged an employer's decision to close one of its plants both by filing unfair labor practice charges with the Board *and* by filing a grievance under the parties' collective bargaining agreement. The Board ruled that the employer's action did *not* violate the NLRA because its decision to close was not a mandatory subject of bargaining, presumably relying on *First National Maintenance*. The arbitrator, by contrast, found that the employer's conduct *did* violate the parties' collective bargaining agreement. In enforcing the arbitrator's decision in relevant part, the Third Circuit rejected the employer's argument that, "if the decision was not bargainable, it was also not arbitrable" (725 F.2d at 936), noting that:

> . . . the obligation to bargain under the NLRA does not delimit the scope of permitted bargaining. . . . The critical difference is that no rights arise under the [NLRA] if a party refuses to bargain over a nonmandatory subject. But it does not follow that there is a right under the statute to refuse to comply with a contract dealing with nonmandatory subjects. . . . "

Similarly, in *Local 206 v. Continental Can Co.*, 821 F.2d 1348 (9th Cir. 1987), the Ninth Circuit affirmed the grant of summary judgment compelling arbitration of a union's grievance over an employer's termination of its transportation operation (a partial closure) and substitution of an independent labor broker to provide drivers. The court of appeals held that arbitration of the union's grievance was mandatory notwithstanding that the parties had acknowledged in their collective bargaining agreement that the employer intended to discontinue the transportation operation, and also notwithstanding that the Board had refused to issue a complaint on the union's unfair labor practice charge challenging the same conduct as a violation of the NLRA. As the Ninth Circuit emphasized, 821 F.2d at 1352:

> The dispute over the company's employment of nonunion truck drivers comes under the arbitration clause, and is a proper subject for arbitration. The decision of the NLRB

not to issue a complaint in the matter does not preclude arbitration.

Our determination that this dispute is arbitrable is based on the language of the arbitration clause. . . . "

See also, Steelworkers v. Asarco, 970 F.2d 1448, 1452 (5th Cir. 1992):

The question whether the company's unilateral implementation of a testing policy violated the NLRA is entirely separate from the question whether the disputes that have arisen out of the testing policy are arbitrable. The fact that unilateral implementation of the testing policy did not violate the NLRA says nothing about whether the arbitration clauses in the various collective bargaining agreements cover the grievances filed by each of the locals. . . .

In sum, the courts below properly analyzed the Union's arbitration demand under this Court's long line of cases favoring arbitration of labor disputes, and properly concluded that *First National Maintenance* and other cases concerning the duty to bargain under the NLRA have no relevance to this question.

C. The Decision Below Does Not Conflict With Other Circuits

Petitioner cites two cases — (1) *Auto Workers v. Lester Engineering Co.*, 718 F.2d 818 (6th Cir. 1983) (hereinafter *"Lester"*) and (2) *Congreso de Uniones Industriales v. V.C.S. Natl. Packing*, 756 F.Supp. 69 (D. Puerto Rico 1991), *aff'd. on other grounds*, 953 F.2d 1 (1st Cir. 1991) (hereinafter *"V.C.S."*) — in an effort to fabricate a split in the circuits where none exists.

Lester involved a union's effort to obtain a preliminary injunction against the announced closure of a plant pending the outcome of an arbitration. In assessing the availability of injunctive relief,

the Sixth Circuit considered whether the parties had agreed in their collective bargaining agreement to submit the dispute to arbitration. Contrary to Petitioner's suggestion, the Sixth Circuit in *Lester* did not hold that a plant closure decision is never arbitrable. Rather, the *Lester* court merely examined the contract for "forceful evidence" of an intent to exclude the dispute from arbitration and found that a contractual provision expressly giving the Employer the exclusive right "to decide the number and location of its plants" constituted such "forceful evidence," thus precluding an order compelling arbitration. 718 F.2d at 824.[3] In short, the Sixth Circuit applied the same settled analysis applied by the Ninth Circuit in the decision below, but reached a different conclusion based upon the facts of that case.[4]

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[3] Contrary to the suggestion of Petitioner, the question whether a closure decision is a mandatory subject of bargaining played absolutely no role in the Court's analysis of the question presented. Although the court mentioned in *dicta* at footnote 3 that the closure decision was "also not subject to the duty to bargain," the purpose of its comment is impenetrable, as it hastens to add that "[w]e, of course, do not hold that the manner in which the plant was closed cannot be subject to the duty to bargain." *Id.*, 718 F.2d at 824, n. 3.

[4] Unlike the present case, the contract in *Lester* contained no provisions inconsistent with the employer's "unilateral right to close its facilities." 718 F.2d at 824. The union had grieved the closure under contract language dealing with plant moves and subcontracting. The Sixth Circuit concluded that the contractual grant of the right of closure was forceful evidence of a mutual intent to exclude closure disputes from grievance and arbitration, but did not address the application of the arbitration clause to the issues raised by the grievance. This would appear to be a questionable conclusion in the light of this Court's discussion of the arbitrability issue in *A.T.& T.*, *supra*, and *Warrior & Gulf*, *supra*. Nevertheless, differing assessments of what constitutes "forceful evidence" of non-arbitrability in differing factual situations and under differ-

(continued...)

V.C.S. presents even less of an argument for a circuit split than *Lester*. In *V.C.S.*, a union sought a district court injunction against a plant closure *without seeking arbitration*, either prior to or during the litigation. *Id.*, 953 F.2d at 2. In upholding the denial of injunctive relief, the First Circuit correctly noted that the Norris-LaGuardia Act, 29 U.S.C. Section 104, prohibits federal courts from issuing injunctions in cases involving labor disputes, *except where such injunctions are issued in aid of arbitration. Id.* Thus, because in *V.C.S.* the Union "failed to request arbitration in its discussions with the Company, in its complaint or in its brief on appeal," the First Circuit properly concluded that the Norris-LaGuardia Act barred the injunctive relief sought. *Id.*, 953 F.2d at 2-3.[5] Significantly, in denying the injunctive relief sought in *V.C.S.*, the First Circuit took care to distinguish and endorse the earlier decision in *Int'l. Ladies Garment Workers' Union v. Bali Co.*, 649 F.Supp. 1083 (D.P.R. 1986), *appeal dismissed*, 815 F.2d 691 (1st Cir. 1987), in which a plant closure was enjoined to preserve the arbitrator's power to award an adequate remedy, "not as an alternative to arbitration." *V.C.S.*, 953 F.2d at 3. Thus, contrary to the position of Petitioner herein, the law of the First Circuit appears to be completely in accord with that of the Ninth —

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[4](...continued)
ing contract provisions do not present a conflict among courts of the kind that calls for the issuance of the writ in order to bring about uniformity among the circuits.

[5] The First Circuit's decision was thus based on the failure of the union at any time to seek arbitration, and so it never reached the arbitrability question upon which the district court had premised its decision. The *V.C.S.* district court, like the Sixth Circuit in *Lester*, had found that express provisions of the collective bargaining agreement excluded the dispute from arbitration. 756 F.Supp. at 72-74. Thus, while the district court also made comments in *dicta* about the duty to bargain over the effects of plant closure (756 F.Supp. at 73, n. 3), nowhere does it suggest that in the absence of a statutory duty to bargain, the decision to close is not subject to arbitration.

to wit, in the absence of "forceful evidence" of an intent to exclude the dispute from arbitration, plant closure decisions may be arbitrated and, indeed, closure may be enjoined if necessary to preserve the arbitrator's ability to fashion a meaningful remedy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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